No. 88-1993

IN THE

Supreme Court of the United States

October Term, 1988

ROBERT A. BUTTERWORTH, JR.
Attorney General of the State of Florida, and
T. EDWARD AUSTIN, JR.,
as State Attorney to the Charlotte County, Florida,
Special Grand Jury,

Petitioners,

v.

MICHAEL SMITH,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

Whether, consistent with the long tradition of secrecy surrounding grand jury proceedings, a state may prohibit witnesses appearing before a state grand jury from disclosing the nature of their testimony without violating the First Amendment to the United States Constitution.

PARTIES TO THE PROCEEDINGS BELOW

The following is a list of all parties appearing in the proceedings before the United States Court of Appeals for the Eleventh Circuit who are petitioners or respondents before this Court:

Petitioners:

Robert A. Butterworth, Jr.
T. Edward Austin, Jr.

Respondent:

Michael Smith

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TABLE OF AUTHORITIES

OPINIONS IN THE COURTS BELOW

The opinion to be reviewed is *Smith v. Butterworth*, 866 F. 2d 1318 (11th Cir. 1989), reversing *Smith v. Butterworth*, 678 F. Supp. 1552 (M.D. Fla. 1988). Both opinions are reprinted in the appendix accompanying the petition for writ of certiorari. References to the materials contained in that appendix will be made by the notation "(Pet.App.)." The Court of Appeals opinion appears at Pet.App. 2; the District Court opinion appears at Pet.App. 9.

JURISDICTION

The decision of the Court of Appeals was entered on February 27, 1989. The petition was filed and docketed within the period established by Supreme Court Rule 20 and 28 U.S.C. 2101(c). The Court granted the petition on October 2, 1989. 58 U.S.L.W. 3183.

This Court has jurisdiction pursuant to 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved are:

United States Constitution, Amendment I:

> Congress shall make no law...abridging the freedom of speech,...

Section 905.27, Florida Statutes (1985):

> (1) A grand juror, state attorney, assistant state attorney, reporter, stenographer, interpreter, or any other person appearing before the grand jury shall not disclose the testimony of a witness examined before the grand jury or other evidence received by it except when required by a court to disclose the testimony for the purpose of:
>
> (a) Ascertaining whether it is consistent with the testimony given by the witness before the court.
>
> (b) Determining whether the witness is guilty of perjury; or
>
> (c) Furthering justice.

> (2) It is unlawful for any person knowingly to publish, broadcast, disclose, divulge, or communicate to any other person, or knowingly to cause or permit to be published, broadcast, disclosed, divulged or communicated to any other person, in any manner whatsoever, any testimony of a witness examined before the grand jury, or the content, gist, or import thereof, except when such testimony is or has been disclosed in a court proceeding. When a court orders the disclosure of such testimony pursuant to subsection (1) for use in a criminal case, it may be disclosed to the prosecuting attorney of the court in which such criminal case is pending, and by him to his assistants, legal associates, and employees, and to the defendant and his attorney, and by the latter to his legal associates and employees. When such disclosure is ordered by a court pursuant to subsection (1) for use in a civil case, it may be disclosed to all parties to the case and to their attorneys and by the latter to their legal associates and employees. However, the grand jury testimony afforded such persons by the court can only be used in the defense or prosecution of the civil or criminal case and for no other purpose whatsoever.
>
> (3) Nothing in this section shall affect the attorney-client relationship. A client shall have the right to communicate to his attorney any testimony given by the client to the grand jury, any matters involving the client discussed in the client's presence before the grand jury, and any evidence involving the client received by or proffered to the grand jury in the client's presence.
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> (4) Persons convicted of violating this section shall be guilty of a misdemeanor of the first degree,

punishable as provided in § 775.083, or by fine not exceeding $5,000 or both.

(5) A violation of this section shall constitute criminal contempt of court.

STATEMENT OF THE CASE

A. Background Facts.

On March 27, 1986, petitioner T. Edward Austin as State Attorney assigned to the Charlotte County, Florida, Special Grand Jury, subpoenaed respondent Michael Smith, a reporter for the *Charlotte Herald-News*, to testify before a special grand jury investigating activities in the Charlotte County state attorney's office and the sheriff's department. At the time Smith testified, he was warned by Austin's staff that disclosure of his testimony was prohibited by § 905.27, Florida Statutes (1985), and could result in criminal prosecution.

The special grand jury terminated its investigation in April, 1986. Smith now wants to publish a news story and possibly a book about the subject matter of the special grand jury's investigation, including his observations of the grand jury process and the matters about which he testified. Such disclosures are prohibited by § 905.27, Florida Statutes (1985).

B. The Complaint and Evidence.

Respondent Smith brought suit in the Federal District Court for the Middle District of Florida claiming that § 905.27 operates as an unconstitutional prior restraint and penal sanction on his First Amendment right of free speech.

The complaint reveals it is not simply his own testimony that Smith would like to write about, but also "the matters that were under investigation by the Charlotte County Special Grand Jury, including the grand jury proceeding itself." See Pet. App. 31. Hence, Smith argues for the constitutional right to publish not only his own testimony but also other testimony and evidence that may have been revealed to him while in the presence of the grand jury. This would necessarily include such matters as the identities of the grand jurors; questions posed or statements made by grand jurors; statements by the prosecuting attorney; anything observed about the source or character of evidence before the grand jury; and any other interaction between and among persons in the grand jury room relating to testimony and evidence received during the proceeding. Indeed, the District Court found this to be Smith's intention. See Pet. App. 19.

Florida, like 16 other states, forbids publication of such matters.[1]

In the District Court proceedings, Smith presented the testimony of two witnesses. W. Christian Hoyer, a chief assistant state attorney in Florida who had ten years experience as a federal prosecutor (R 11, p. 14), testified that his office handled 15,000 felonies a year and 50 to 100 grand jury indictments (R 11, p. 19). When asked if he felt there was a growing need to require witness secrecy, he said he did not feel competent to given an opinion (R 11, p. 20). He acknowledged that in his experience lack of secrecy in the federal system had on occasion slowed an investigation but not jeopardized it (R 11, p. 17). Hoyer stated, however, that particularly with respect to long-term investigations lack of

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1 See Appendix "A" to Memorandum of Law in Support of Motion for Preliminary Injunction (R 3).

secrecy had a "negative impact" (R 11, p. 20). As a result, one investigation "didn't go as far as it could have gone" (R 11, p. 21). Witnesses who spoke to the press in fact "made the grand jury angry in some instances" (R 11, p. 21). Another negative effect of such disclosures was "to broadcast the nature of the investigation to others," but Hoyer could not cite a specific instance where that caused a "concrete harm."

John Fitzgibbons, Smith's only other witness and also a former federal prosecutor, had handled "in excess of fifty" grand jury investigations (R 11, pp. 9-10). He testified that he "couldn't think of any" problems caused by the lack of a secrecy requirement for federal grand jury witnesses.

The District Court had before it in support of the statute the affidavit of State Attorney Joseph D'Alessandro of Florida's Twentieth Judicial Circuit (R 14, Exhibit A); and the depositions of Warren Goodwin (R 17) and Don Modesitt (R 18).

D'Alessandro, who has 20 years experience with Florida grand juries, stated that barring witness disclosure of testimony "encourages free and unhampered disclosure by persons who have some information pertinent to the subject matter of investigation," and that allowing witnesses to publicly disclose the nature and content of the testimony "will be a hindrance to prosecution." D'Alessandro knew of instances where a person's character was besmirched by witness disclosures.

Warren Goodwin, an assistant state attorney, has worked with 24 Leon County, Florida grand juries (R 17, p. 4). He testified that under Florida law a grand jury that fails to complete its work during its term will pass the pending matters to a subsequent grand jury (R 17, p. 5). Goodwin said witness disclosure of testimony would lead to public ridicule or embarrassment from unfounded allegations (R

17, pp. 6-7) and impair the integrity of future grand juries seeking to rely on testimony adduced during a preceding grand jury (R 17, p. 8). Goodwin also said witness disclosure would violate the oath administered to witnesses (R 17, pp. 9-11).

Donald Modesitt served as a federal prosecutor in North Florida working with federal grand juries, and also as State Attorney for Florida's Second Judicial Circuit (R 18, pp. 4-6). Modesitt said there are differences between federal and Florida grand juries in that state grand juries are more investigative in nature (R 18, p. 7). Federal grand juries cannot charge without indictment, whereas, under Florida law, an information may be filed or a presentment issued (R 18, pp. 10-11). He feared disclosure of witness testimony because suspects may flee from justice, destroy evidence, or engage in cover-up activities, thereby compromising an investigation (R 18, pp. 10-12). Additionally, the grand jurors themselves may be subjected to apprehension and fear of disclosure of their identities (R 18, p. 9).

C. Rulings Below.

The District Court found the Florida statute constitutional in that it was based upon "a compelling need for continued secrecy." Pet. App. 20. The Court found the statute was "designed to enhance Florida's ability to detect and eliminate organized criminal activity by improving the evidence-gathering process." *Id.* The statute served not only to

protect the identityof the grand jurors[2] but also prevented the hindering of prosecution and impairment of present and future investigations. *Id.* Rejecting Smith's contention that some lesser degree of secrecy might hypothetically serve these interests, the District Court stated:

> The Florida legislature has opted for the maximum possible [secrecy]. The court believes that it is absolutely within the discretion of the legislature that it make that quantitative analysis of its judicial process.

(Pet.App. 28)

The Eleventh Circuit Court of Appeals, while acknowledging that the foregoing interests were "legitimate," did not find them "sufficiently compelling to justify the criminal punishment of *any* person, including a witness, who divulges the content of grand jury testimony." Pet. App. 6. It therefore ruled the statute unconstitutional to the extent it applied "to witnesses who speak about their own testimony *after* the grand jury investigation is terminated." *Id.* at 7 (emphasis supplied).

The opinion of the Court of Appeals is not clear as to whether a witness may divulge, in addition to his testimony, that which he observes or infers from the proceedings.

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2 The District Court could not have stated this more forcefully:

> The Court believes that independence of mind is as important for the grand jurors as for the witnesses in the truth-gathering process, if not more so. Permanent, total confidentiality allows the necessary independence of mind required for the effective functioning of the grand jury. It allows the juror to be as certain as he possibly can be that his identity will not be revealed, subjecting him to retaliation. This frees the juror to ask searching questions.

Pet.App. 27.

Presumably, because the Court found *all* of the state's interests in secrecy insufficiently compelling, *id.* at 6, a witness may do so.

SUMMARY OF ARGUMENT

Grand jury proceedings in this country have historically enjoyed the highest degree of secrecy. This Court has often acknowledged that their proper functioning depends on secrecy and that the interests in continued secrecy are not eliminated when grand jury activities cease.

Disclosure of witness testimony may compromise ongoing investigations or stimulate efforts to suborn perjury or otherwise affect later testimony at trial, even after a grand jury term ends. The integrity of grand jury proceedings may be compromised by allowing witnesses to report everything they observe or imagine they have observed. Protecting the identity of the innocent accused, one of the most compelling reasons for secrecy, would be left to the personal whim of witnesses under the ruling below. It is within the authority of the state to decide how much, if any, of the grand jury proceedings should be made public.

The respondent here seeks to publish information that by law is secret, and not lawfully acquired from other sources. Hence, the First Amendment analysis applicable to this case is that set forth in *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984), that is, whether the restriction furthers an important or substantial governmental interest unrelated to the suppression of expression, and whether the limitation on disclosure is no greater than is necessary or essential.

The Florida statute furthers important governmental interests unrelated to the suppression of expression and is not more restrictive than is necessary or essential for that

purpose. The respondent may report information he develops that is independent of the grand jury proceedings. The determination of what is necessary or essential does not require consideration of whether there are conceivable alternatives but only whether the statute promotes a substantial governmental interest that would be achieved less effectively by other means.

ARGUMENT

A STATE MAY PERMANENTLY BAR WITNESSES FROM PUBLICLY DISCLOSING THE TESTIMONY THEY HAVE GIVEN BEFORE A GRAND JURY WITHOUT VIOLATING THE FIRST AMENDMENT.

Grand jury proceedings have long been conducted in secret. Since the 17th Century, "[they] have been closed to the public, and records of such proceedings have been kept from the public eye." *Douglas Oil Co. of California v. Petrol Stops Northwest,* 441 U.S. 211, 218 n. 9 (1979). This Court has repeatedly recognized that "the proper functioning of our grand jury system depends upon the secrecy of grand jury proceedings." *Id.* at 218, citing *United States v. Proctor & Gamble Co.,* 356 U.S. 677 (1958). See also *Dennis v. United States,* 384 U.S. 855 (1966); *United States v. Johnson,* 319 U.S. 503, 513 (1943). In analyzing the effects of disclosure on grand jury proceedings, "the courts must consider not only the immediate effects upon a particular grand jury, but also the possible effect upon the *functioning of future grand juries." Douglas Oil Co., supra* at 222 (emphasis supplied). The interests in grand jury secrecy may be reduced, but they "are not eliminated merely because the grand jury has ended its activities." *Id.*

In this case the Eleventh Circuit found it a violation of the First Amendment for a state to prohibit a grand jury witness from disclosing his testimony "after the grand jury investigation is terminated." A fair reading of the opinion, which discounts all of the interests a state may have in continuing grand jury secrecy, would suggest that a witness may divulge anything he observes or infers from his appearance before the grand jury even though the Florida statute bars disclosure of "other evidence received," as well as testimony. See § 905.27(1).

The decision of the Eleventh Circuit gives far too little weight to the demonstrable interests of the state in continuing grand jury secrecy. It also erroneously relies on decisions of this Court striking down penal sanctions against publication of truthful information that was freely available in the public domain.

A. The Need For Secrecy Continues After Termination of Grand Jury Proceedings, and Assurance of That Secrecy Is An Appropriate Policy Decision of the State.

The decision of the Eleventh Circuit assumes that there is no need for secrecy once a grand jury investigation terminates. This ignores both the fact that further investigations or trials may ensue and the effect that unrestricted disclosure may have upon the functioning of the grand jury itself. This Court has recognized a number of substantial purposes served by continued secrecy. These include:

> 1. To prevent the escape of those whose indictment may be contemplated;
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> 2. to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors;
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> 3. to prevent subornation of perjury or tampering with the witnesses who may testify before [the] grand jury and later appear at the trial of those indicted by it;
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> 4. to encourage free and untrammeled disclosures by persons who have information with respect to the commission of crimes;
>
> 5. to protect an innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt.

Douglas Oil Co., 441 U.S. at 219, n.10.

The need for secrecy does not end with the grand jury's session. An investigation by law enforcement officials may continue even though a grand jury does not initially indict. Disclosure of evidence and testimony could easily compromise such ongoing or related investigations. If there is an indictment, trial may not occur until after the grand jury is disbanded. Hence, a witness's disclosure of his testimony could cause those still under investigation to flee or lead directly to attempts at subornation of perjury or to other forms of tampering, intimidation or even elimination of witnesses.

Furthermore, the ability of a grand jury to deliberate and act "in the utmost freedom" is not secured by permitting witnesses to divulge everything they may observe or infer or imagine about the demeanor, attitudes, or questions of various jurors. A juror who fears that his degree of interest in pursuing a particular investigation will be widely reported may well be a less effective juror. He should not be burdened with further concern over accounts that may sensationalize or otherwise distort the grand jury proceedings and the roles individual jurors may have played.[3] Nor is the jury's freedom enhanced by permitting a witness to publicly report on or speculate about other evidence or testimony before the jury based on what might have been shown to or asked of him.

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3 A grand jury's scope of inquiry is not limited by questions of propriety or by forecasts of the probable result of the investigation or by doubts whether any particular individual will be found properly subject to an accusation of crime. *Blair v. United States*, 250 U.S. 273, 282 (1919).

If secrecy serves to protect the witnesses as well as the fruits of the grand jury's investigation, it is no less vital in serving "to protect [the] innocent accused who is exonerated from disclosure of the fact that he has been under investigation...." *Douglas Oil Co.*, 441 U.S. at 219, n. 10. Grand jury secrecy is "as important for the protection of the innocent as for the pursuit of the guilty," *United States v. Sells Engineering, Inc.*, 463 U.S. 418 (1983), citing *United States v. Johnson*, 319 U.S. 503, 513 (1943), this being so for the obvious reason that "[a] great injustice can be done and irreparable injury caused to the reputation of a citizen if it became known that there *is or ever was* before the grand jury any proceeding concerning such a person subsequently not indicted." *The Grand Jury—Its Role and Power*, 17 F.R.D. 331 (emphasis supplied). In the absence of a statute or rule, this Court has always been "reluctant to conclude that a breach of [grand jury] secrecy has been authorized." *Sells Engineering, Inc*, 463 U.S. at 425. Despite a clear statute that *mandates* secrecy, the decision below gives virtually no thought whatsoever to protection of the innocent or to the other purposes served by continued secrecy.

No federal court other than the Eleventh Circuit has heretofore ruled that the power of the state to keep secret its grand jury proceedings is constrained by the First Amendment. What authority exists is plainly to the contrary. As to the contention that the oath of secrecy administered to grand jury witnesses violated their right of free speech, the Ninth Circuit Court of Appeals has stated:

> The right is not absolute.... It has never been supposed that grand jurors are deprived of the constitutional right of free speech through an oath of secrecy...and a witness summoned to appear before them is in no better case. Through their participation witnesses occupy a special relationship to the state; *for reasons grounded in public policy, as we have seen, the testimony taken in these proceedings is privileged and confidential.*

Goodman v. United States, 108 F.2d 516, 520 (9th Cir. 1939) (emphasis supplied).[4]

Before the adoption of Rule 6(e), Federal Rules of Criminal Procedure, the federal courts were empowered to require an oath of secrecy of grand jury witnesses. *Goodman*, 108 F.2d at 520. The current Rule 6(e) simply represents a policy decision to allow witness disclosure. The Florida Legislature has chosen to enforce a greater degree of secrecy in the interest of protecting the results of investigations, the functioning of present and future grand juries, and the innocent accused who may be exonerated. "[T]he investigation of crime by the grand jury implements a *fundamental* governmental role of securing the safety of the person and property of the citizen." *Branzburg v. Hayes*, 408 U.S. 665, 700 (1972) (emphasis supplied). It is within the discretion of the state

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4 The District Court below noted that *Goodman v. United States* preceded Federal Rule of Criminal Procedure 6(e) that allows disclosure of witness testimony. The court also pointed out that Rule 6(e) is a rule of *procedure* (Pet.App. 22) and that its adoption "was not predicated on First Amendment considerations, but on the idea of fairness." (Pet.App. 23) The Advisory Committee Notes to the rule state that "The seal of secrecy seems an unnecessary hardship and may lead to injustice if a witness is not permitted to make a disclosure to counsel or to an associate." (Pet. App. 23) The Florida statute in question permits a witness to disclose to his attorney "any testimony given by the client to the grand jury, any matters involving the client discussed in the client's presence before the grand jury, and any evidence involving the client received by or proferred to the grand jury in the client's presence." See § 905.27(3), Florida Statutes (1985).

to decide what degree of secrecy best protects the integrity of grand jury proceedings.[5]

The singular desire of an individual to write about and publish the details of his testimony and experience before a grand jury does not amount to the compelling necessity and particularized need that this Court has recognized may warrant the disclosure of grand jury transcripts under Rule 6(e). *See Douglas Oil Co.*, 441 U.S. at 222 (parties seeking grand jury transcripts under Rule 6(e) must show that the material they seek is needed to avoid possible injustice, that the need for disclosure is greater than the need for continued secrecy, and that the request is structured to cover only material needed) (relying on *United States v. Proctor & Gamble*, 356 U.S. 677 (1958)). Such a showing must be made even when the grand jury *has concluded its operations*, and the party seeking disclosure bears the burden of demonstrating that the need for disclosure outweighs the public interest in secrecy. *Douglas Oil Co.*, 441 U.S. at 222. Here Smith has not shown or even claimed a *need* for disclosure. He merely advances the wish to write a book about his experience before the grand jury. That is not the "compelling necessity" required to breach "the indispensable secrecy of grand jury proceedings." *United States v. Johnson*, 319 U.S. 503, 513 (1943).

The Eleventh Circuit seemingly equates all grand jury investigations, regardless of whether the subject is a single capital offense or a continuing inquiry into organized crime,

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5 As the District Court stated:

> This Court is well aware of the awesome responsibility that falls on the grand juror.... The Court believes that the legislature has the power and duty to impose the rules it deems necessary to ensure the integrity of the truth-finding process and, specifically, to guard the safety of the jurors themselves.

(Pet. App. 24)

international drug smuggling, public corruption or complex, white collar offenses. Florida has chosen not to attempt to categorize grand jury inquiries, believing that an absolute blanket of secrecy better serves the interests at stake and the "fundamental governmental role" of the grand jury. It is within Florida's discretion to determine whether any part of a grand jury's proceedings may be publicly divulged by a participant.

B. Florida Statute § 905.27 Furthers a Substantial Governmental Interest Unrelated To The Suppression of Expression And Is No Greater Than Necessary For the Protection of That Interest.

The Eleventh Circuit found fault with Florida's secrecy statute, erroneously holding that only the "highest form of state interest" could justify penalizing the publication of truthful information. (Pet.App. 5). It added that even where a "compelling state interest" can be shown, the state must demonstrate that its goal cannot be achieved by means that do not infringe as significantly on First Amendment rights. *Id.*

The ruling below, however, relies primarily on *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97 (1979), and *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978). In *Smith* the Court struck down a statute punishing the truthful publication of the name of a juvenile offender that was lawfully obtained by the newspaper and widely known in the community. 443 U.S. at 105-106. In *Landmark* the Court ruled that the First Amendment did not permit criminal punishment of a newspaper for publishing truthful information regarding confidential proceedings of the Judicial Inquiry and Review Commission when the information was obtained by lawful means. Together these cases stand for the simple proposition that a state cannot under the First

Amendment prohibit publication of truthful information available in the public domain or otherwise lawfully obtained by the news media.[6]

These cases are inapposite because respondent Smith does not seek to publish information that has been "lawfully obtained" or is otherwise known or available to the public. The events transpiring in the grand jury room and the testimony given therein are not information that is available to the public or that has been lawfully acquired by the respondent. Nor does Smith have any First Amendment right of access to the information and testimony in the grand jury proceedings. *See, e.g., Press-Enterprise Co. v. Superior Court,* 478 U.S. 1 (1986)(right of access to preliminary hearing in criminal prosecution). Hence, because suppression of lawfully obtained information is not at stake, the state need not show that continued secrecy represents "the highest form of state interest" or a "compelling state interest."[7]

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6. Smith has also relied heavily on *Worrell Newspapers of Indiana, Inc. v. Westhafer,* 739 F.2d 1219 (7th Cir. 1984), *aff'd* 469 U.S. 1200 (1985). In *Worrell* the state statute provided for punishment by contempt of anyone who disclosed the name of a person charged by a sealed information before an arrest could be effected. Like *Smith v. Daily Mail* and *Landmark Communications, Worrell* simply found that the state could not constitutionally punish a person who truthfully published information lawfully obtained, *i.e.*, the name of the accused. In *Worrell,* the name was obtained by the newspaper from a confidential source. *See also The Florida Star v. B.J.F.,* ___U.S.___, 105 L.Ed.2d 443, 453-454 (1989).

7. The petitioners submit that if this were the test that must be met, protection of a grand jury's secrecy would surely qualify as the "highest form of state interest." Smith has only argued that because the federal government makes do with a lesser degree of secrecy, the states should too. What the federal practice may be is certainly not determinative of the requirements of the Constitution. Such argument hardly proves that Florida's law does not protect the real and compelling purposes served by secrecy, which purposes have been recognized repeatedly by this Court.

To the extent the First Amendment has any application at all to grand jury secrecy requirements, this case is controlled by the Court's reasoning in *Seattle Times Co. v. Rhinehart,* 467 U.S. 20 (1984). In *Seattle Times,* the newspaper appealed a protective order that prohibited it from publishing information obtained through discovery procedures that were available to it solely because it was a party to a lawsuit. The newspaper contended that any protective order limiting expression must be founded on a compelling state interest and that there must be no alternatives which would intrude less directly on expression. *Id.* at 31.

This Court expressly and unanimously rejected these standards, stating that "'freedom of speech . . . does not comprehend the right to speak on any subject at any time." *Id.* at 31, quoting *American Communications Association v. Douds,* 339 U.S. 382, 394-395. It found the critical question to be "whether a litigant's freedom comprehends the right to disseminate information . . . obtained pursuant to a court order that both granted . . . access to that information and placed restraints on the way in which the information might be used." *Seattle Times Co. v. Rhinehart,* 467 U.S. at 32. The controlling inquiry was:

> 1. Whether the practice in question furthered an important or substantial governmental interest unrelated to the suppression of expression; and
>
> 2. Whether the limitation of First Amendment freedoms is no greater than is necessary or essential to the protection of the particular interest involved.

Id., quoting *Procunier v. Martinez,* 416 U.S. 396 (1974).

If the First Amendment applies at all to grand jury secrecy requirements then these are the critical considerations because Smith was granted "access" to grand jury proceedings

only by compulsion of laws effectuating the "fundamental governmental role" (*Branzburg*, 408 U.S. 700) of the grand jury, which laws restrained, and indeed prohibited, his revealing testimony or other evidence adduced in those proceedings. As in *Seattle Times*, Smith has no First Amendment right of access to information made available to him only in the course of a grand jury criminal investigation, itself a proceeding that is not public. 467 U.S. 32-33.[8]

Grand jury secrecy furthers substantial governmental interests unrelated to the suppression of expression. Secrecy frees the jurors to be inquisitive and probing; it protects their identities; it shields the innocent accused; it prevents the divulgence of information relating to ongoing criminal enterprises. These interests do not cease when a grand jury session terminates, and by any measure they are far weightier than the "annoyance, embarrassment or oppression" that warranted the prohibition on disclosure of discovery information in *Seattle Times*. This Court expressly rejected the need for any "heightened First Amendment scrutiny" of state rules for discovery and protective orders in *Seattle Times*. Likewise, there is no need for heightened scrutiny of Florida's law. It leaves Smith free to undertake his own inquiries, to contact sources and the witnesses to wrongdoing, to review documents available to him, and to report what he deems newsworthy from his independent efforts. The Florida law is not greater than is necessary or essential for the protection of grand jury secrecy.

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8 The Court noted in *Seattle Times* that the newspaper remained free to "disseminate the identical information covered by the protective order as long as the information is gained through means independent of the court's processes." 467 U.S. at 34. The Florida statute in question does not prohibit Smith from reporting facts that he did not learn or testify to when he was before the grand jury. He is free to contact the usual sources and suspects and report *lawfully obtained* information.

Smith's evidence proves at most that not all witness disclosures compromise grand jury investigations, a point that completely fails to recognize that secrecy serves a number of other purposes. Proceeding from here, his argument seems to be that because not *every* disclosure by a grand jury witness is harmful, the Florida law sweeps too broadly in prohibiting *any* disclosure by such a witness. But, as stated, "courts consider not only the immediate effects upon a particular grand jury but also the possible effect upon the functioning of future grand juries." *Douglas Oil Co.* v. Petrol Stops Northwest, 441 U.S. 211, 222 (1979). To make disclosure the rule, as the Eleventh Circuit has done, is to diminish the integrity of all grand juries, risk the exposure of the innocent, invite speculative, distorted or sensationalized reporting, and permit the possible compromise of complex and ongoing criminal investigations.[9]

The determination of whether a restriction on speech is "necessary or essential" under the *Seattle Times* test, moreover, does not compel consideration of whether there are "conceivable alternatives." *See United States v. Albertini*, 472 U.S. 675, 688 (1985). A burden on speech "is no greater than is essential," and is therefore permissible, "so long as it promotes a substantial governmental interest that would be achieved less effectively absent the regulation." *Id.* at 689. The validity of the restriction does not depend on judicial agreement that the restriction is "the *most appro-*

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9 The Florida Supreme Court has also stated that it is the *effect* of disclosure on grand jury functioning that is of primary concern:

> While, in a given case, the reason for secrecy may no longer obtain, the effect on subsequent grand jury proceedings — on jurors, on witnesses, on the privacy of the system itself — of indiscriminate disclosure has been said to be "of greater moment." *United States v. General Motors*, D.C. Del. 1954, 15 F.R.D. 486, 488.

Minton v. State, 113 So.2d 361, 365 (Fla. 1959).

priate method for promoting significant government interests." *Id.* (emphasis supplied). *See also Seattle Times*, 467 U.S. at 37 ("where...a protective order is entered on a showing of *good cause*,...is limited to the context of pretrial discovery, and does not restrict the dissemination of the information if gained from other sources, it does not offend the First Amendment") (emphasis supplied).

By these criteria, § 905.27, Florida Statutes, is clearly constitutional, and the Eleventh Circuit erred in attempting to draft what it thought to be a least restrictive and "more appropriate" statute.

Finally, Smith has articulated no principled basis for distinguishing between witnesses on the one hand and other participants in grand jury proceedings who are forbidden to disclose matters occurring before the grand jury.[10] If the First Amendment permits witnesses to disclose their testimony and observations when the grand jury's term ends, then other participants in the proceedings are equally entitled to argue their right to profit from publication of the knowledge they have gleaned. The tattered remnant of grand jury secrecy that then remains will be virtually worthless.[11]

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10 *See, e.g.*, Rule 6(e), Fed.R.Cr.P., which forbids disclosure by all persons, except witnesses, who are privy to grand jury information unless a court directs disclosure.

11 Although federal courts still apparently retain authority to prohibit disclosures by witnesses through appropriate orders (*see In re: Swearingen Aviation Corp.*, 486 F.Supp. 9, 10-11 (D.C.Mo. 1979), and cases cited therein), presumably, if the Eleventh Circuit's arbitrary cut-off point is correct, they may not now constitutionally do so for longer than the term of the grand jury no matter what the circumstances.

CONCLUSION

The judgment of the Court of Appeals should be reversed, and the decision of the District Court reinstated.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief for Petitioners was served in accordance with Rule 28-1 of the Rules of the Supreme Court of the United States by depositing three true copies in a United States Post Office or mailbox, with first-class postage prepaid, addressed to:

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_____/s/_____
GEORGE L. WAAS